Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

GURMEET SINGH DHINSA,

Petitioner,

v.

AL HERRERA, Warden,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where a criminal defendant, who is serving a life sentence, timely files a habeas corpus petition complaining that his counsel denied him the right to testify on his own behalf, in violation of the Fifth and Sixth Amendments, can he be forever barred from having the merits of those constitutional claims reviewed merely because his attorney erroneously filed the petition in the wrong judicial district — and the district court mistakenly dismissed the timely-filed petition, instead of *transferring* it to the proper district as required by 28 U.S.C. § 1631, which provides that the court "shall" transfer the proceeding to the right district if it is in the interest of justice?

Should there be a judicially construed "tolling" provision to accommodate procedural failures that are not attributable to a habeas petitioner?

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Petitioner Gurmeet Singh Dhinsa respectfully requests that a writ of certiorari be issued to review the judgment and order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding. The order was filed on June 13, 2006.

OPINIONS AND ORDERS BELOW

(1) On October 1, 2001, this Court denied Gurmeet Dhinsa's petition for a writ of certiorari following his direct appeal of his conviction and life sentence from the Eastern District of New York and Second Circuit. *United States v. Dhinsa*, 243 F.3d 635 (2d Cir. 2001); *Dhinsa v. United States*, No. 01-327, 534 U.S. 897 (2001).

(2) On September 16, 2002, Petitioner timely filed a petition for a writ of habeas corpus in the district court for the Central District of California. On September 23, 2002, Judge Virginia A. Phillips summarily dismissed the petition for lack of jurisdiction in an unpublished order. App. 1-3. The order was never entered until October 2, 2002.

(3) Petitioner's counsel, on November 20, 2002, then refiled the habeas petition in the Eastern District of New York. Chief Judge Edward R. Korman denied the renewed petition on December 31, 2003, in an unpublished memorandum and order, because it was not timely filed. App. 19-23.

(4) On August 26, 2004, the Second Circuit issued an unreported decision denying Petitioner's appeal and motion for a certificate of appealability. App. 25-26. This Court denied a petition for a writ of certiorari on February 28, 2005. *Dhinsa v. United States*, No. 04-1019, 543 U.S. 1188 (2005).

(5) On June 29, 2004, Petitioner filed a motion, pursuant to Fed. R. Civ. P. 60(b), in the Central District of California to reopen Judge Phillips order of October 2, 2002, which dismissed the timely habeas petition, instead of transferring it to the Eastern District of New York. On December 17, 2004, Magistrate Judge Stephen G. Larson issued a Report and Recommendation denying Petitioner's motion. App. 5-12. Judge Phillips adopted the Report and Recommendation in its entirety in an unpublished decision dated February 17, 2005. App. 13-14.

(6) In an unpublished decision filed April 5, 2006, a panel of the Ninth Circuit affirmed the district court's determination. App. 15-17. *See Dhinsa v. Herrera*, 173 Fed. Appx. 630, 2006 WL 897654 (9th Cir. 2006). And, by order dated June 13, 2006, the Ninth Circuit denied a petition for rehearing and suggestion for rehearing *en banc*. App. 27.

JURISDICTION

The order of the Ninth Circuit was filed on June 13, 2006. The 90-day period for filing this petition for certiorari expires on September 11, 2006. *See* Rule 30.1. The jurisdiction of this Court to review the ruling of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that no person shall, in a criminal case, "be a witness against himself" and shall not be "deprived of life, liberty, or property, without due process of law."

The Sixth Amendment further instructs that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Rule 60 of the Federal Rules of Civil Procedure, entitled "Relief from Judgment or Order," provides in part as follows:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.



28 U.S.C. § 1631, entitled "Transfer to Cure Want of Jurisdiction," states, in pertinent part, that

> [w]henever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 2255, known as a habeas corpus statute, provides in pertinent part:

> [u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of facts and conclusions of law with respect thereto.

STATEMENT OF THE CASE

Gurmeet Singh Dhinsa, the Petitioner, was charged with federal racketeering crimes and related offenses, including two counts of murder, in the Eastern District of New York. The charges resulted from his ownership and operation of a chain of gasoline stations in the New York area. The trial, which was held in 1999, spanned nearly four months and included testimony of approximately 100 witnesses. Hundreds of exhibits were introduced into evidence and the transcripts were voluminous. The jury convicted Petitioner of 21 counts of the 29-count indictment but voted against imposition of the *death penalty*. Chief Judge Korman, who presided over the trial, sentenced Petitioner to eight terms of life imprisonment.

On March 21, 2001, the Court of Appeals for the Second Circuit affirmed the conviction. The appeal raised at least nine substantive and constitutional issues, which the court addressed in a *66-page published decision. See United States v. Dhinsa*, 243 F.3d 635 (2d Cir. 2001).[1] On October 1, 2001, this Court declined to grant certiorari. *Dhinsa v. United States*, 534 U.S. 897 (2001).

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[1] The Second Circuit vacated the judgment and conviction on three counts (a threat to murder and interstate kidnapping), and remanded for a new trial should the government decide to re-prosecute. 243 F.3d at 677-78.

On September 16, 2002, which was still *within one year of the date that the conviction became final*, Petitioner's attorneys mistakenly commenced a habeas corpus proceeding, pursuant to 28 U.S.C. § 2241, in the Central District of California, rather than a habeas petition under 28 U.S.C. § 2255 in the Eastern District of New York.

The habeas petition indicated that it was filed in California because, following his conviction in the Eastern District, Petitioner was "immediately transferred for detention at the [United States Penitentiary] Lompoc, which is located within the Central District of California, where he remains to date."

The habeas petition, which raised critical Fifth and Sixth Amendment issues, then detailed that the conviction was obtained without Mr. Dhinsa being properly instructed of his constitutional right to testify. Specifically,

> Claimant is a United States resident alien with no true familiarity with the American legal system. He was tried and convicted on a number of counts, including racketeering and murder. Nearly all evidence produced at trial was circumstantial in nature. Claimant was not properly instructed by his attorney or the court of his constitutional right to testify in his own behalf.

"I Did Not Realize the Decision to Testify or Not Was My Own to Make"

The petition was supported by Gurmeet Dhinsa's handwritten certification, which was notarized on September 7, 2002. The certification confirmed that Mr. Dhinsa was born in India and only learned English while working as a restaurant delivery boy and later as a gas station attendant. Furthermore, *he wanted to testify at trial* and would have disputed testimony of the government's witnesses as to the charges of conspiracy, racketeering, murder and kidnapping.

Petitioner's sworn certification also described that, at various times during the trial, he emphasized to defense counsel his desire to testify on his own behalf. And, on each occasion he was told "hold on," "let's see how it goes," and words to that effect. This immigrant, who had no training in the American legal system and had worked in a gas station, "accepted this direction" because he was told by the trial judge that he had to speak through defense counsel. Thus, he thought that he "had to listen to what defense counsel told" him he must do.

Gurmeet Dhinsa proclaims in simple but stark terms: "I did not realize the decision to testify or not was my own to make." Therefore, when trial counsel eventually told him "we don't want you to testify," Petitioner felt that he "had no choice" but to accept that determination. He was never asked — by defense counsel or the judge — whether he wanted to testify or whether he wanted to forgo that fundamental constitutional right.

The consequences of this error are grave because had Petitioner been afforded an opportunity to testify on his own behalf, he could have established that *he was not even at the scene of one of the murders*! In addition, he would have presented other compelling evidence to show that the case against him was the product of perjured testimony. Nevertheless, his attorneys "ignored that evidence" and deprived Mr. Dhinsa of his constitutional right to testify. Significantly, unlike most cases raising Sixth Amendment claims of ineffectiveness, trial counsel *does not deny* Petitioner's account.

A Habeas Corpus Petition was Timely Filed but in the Wrong Judicial District

Tragically, Mr. Dhinsa's counsel filed his petition in the wrong federal judicial district. Therefore, even though his application for habeas relief was *timely filed* and presented to the federal courts, Judge Virginia A. Phillips summarily dismissed the petition for lack of jurisdiction, without prejudice (App. 3). The court reasoned that "there is nothing about petitioner's presence in a federal prison in California which prevents him from bringing a Section 2255 motion in the sentencing court" (App. 3). As a consequence, the habeas petition filed under 28 U.S.C. § 2241 was dismissed because "petitioner has failed to make the requisite showing that Section 2255 is an inadequate or ineffective remedy." *Id.*

The Order Dismissing the Habeas Petition Filed in the Central District of California Was Issued Before the One-Year Time Limitation Had Expired But Never Entered by the Court Until After the Deadline

Although difficult to imagine, this disastrous tragedy became far more calamitous for Mr. Dhinsa by virtue of the fact that Judge Phillips' decision, issued on September 23, 2002, *before* Petitioner's one-year time limit had expired, was not entered by the Clerk of the Central District of California until October 2, 2002 — the day *after* the deadline had run. Therefore, because of the court's delay in entering the order, counsel for Petitioner, who was across the country, in New Jersey, did not even learn that the habeas petition had been dismissed until *October 7, 2002* — a full week after the cut-off date under 28 U.S.C. § 2255 had lapsed.

Counsel then had to file a new petition in the Eastern District of New York. At that time, Mr. Dhinsa was incarcerated in a maximum security facility more than 3,000 miles from counsel's office and extremely difficult to access. Thus, the § 2255 Petition was ultimately filed on November 20, 2002 — within weeks of counsel learning of Judge Phillips' decision.

The Prosecution Took More than Nine Months to Respond to the Renewed Habeas Petition Filed in the Eastern District of New York and Never Claimed that the Petition was Untimely

The proceedings in the Eastern District were substantially delayed by the government's numerous applications for extensions relating to its investigation of the merits of the habeas petition. Thus, from January 8, 2003 and continuing for the next *nine months*, the court regularly granted the prosecution's motions for adjournments. The government finally filed its responding brief on September 22, 2003 without raising any objection to the timeliness of the habeas petition.

Trial Counsel Was Unable to Refute Petitioner's Claim of Ineffective Assistance

On September 30, 2003, Judge Korman directed trial counsel to file an affidavit responding to Petitioner's claim of ineffective assistance of counsel. On October 7, 2003, the attorney submitted an affidavit indicating that he did not have sufficient memory to refute Mr. Dhinsa's allegations regarding conversations that they had or to recall tactical decisions made at trial.

The Eastern District Dismissed the Habeas Petition Without a Hearing or Addressing the Merits

On October 28, 2003 — more than one year after Mr. Dhinsa's original petition was dismissed — Judge Korman raised for the first time, *sua sponte*, a question relating to the timeliness of the habeas petition. Then, on December 31, 2003, *without conducting an evidentiary*

hearing or oral argument, and *without addressing the merits of the constitutional claims*, the court dismissed the petition as untimely under § 2255 (App. 22-23). Judge Korman also refused to grant a certificate of appealability, which would have enabled the Court of Appeals for the Second Circuit to review his determination (App. 23).

On August 26, 2004, the Second Circuit denied Gurmeet Dhinsa's application for a certificate of appealability and dismissed the appeal on the basis that the § 2255 motion was time-barred (App. 25). A petition for certiorari was denied on February 28, 2005. *Dhinsa v. United States*, No. 04-1019, 543 U.S. 1188 (2005).

Petitioner Filed a Rule 60(b) Motion in California for Relief from the Order that Dismissed the Timely-Filed Habeas Petition, Rather than Transferring it to New York

Since no court had ever reviewed the *merits* of Petitioner's Fifth and Sixth Amendment claims, to ensure that Mr. Dhinsa was not further prejudiced, on June 29, 2004, while the Second Circuit was still considering his application, Petitioner filed a motion, pursuant to Fed. R. Civ. P. 60(b), in the Central District of California for relief from Judge Phillips' order dismissing the timely-filed habeas petition. This marked the defining moment in the long and tortuous voyage of this petition.

The Rule 60(b) motion is emphatic that, under 28 U.S.C. § 1631, Judge Phillips was mandated to transfer the habeas petition to the correct district — the Eastern District of New York — rather than summarily dismiss it. Significantly, the court *conceded* that there is decisive

precedent to support the argument that § 1631 compels the transfer of a petition to the Eastern District of New York (App. 8, citing *Miller v. Hambrick*, 905 F.2d 259, 262 [9th Cir. 1990]; App. 14).

Nevertheless, Judge Phillips found that despite the "broad and open-ended language" of Rule 60(b)(6), authorizing the reopening of a final order for "any other reason justifying relief from the operation of the judgment," no extraordinary circumstances existed that were beyond Petitioner's control which prevented him from taking timely action to correct the erroneous judgment (App. 10). The court based its determination on the fact that counsel never filed a motion to reconsider the October 2nd order and did not appeal to the Ninth Circuit. *Id.*

As a consequence, although acknowledging the "series of unfortunate events" that led to Petitioner being denied any review of the merits of his claims, on December 17, 2004, Magistrate Judge Stephen G. Larson, of the Central District of California, recommended that judgment be entered denying the Rule 60(b) motion (App. 10, 12). And, on February 17, 2005, Judge Phillips issued an order adopting the recommendations and findings of the Magistrate (App. 13-14).

The Ninth Circuit affirmed on April 5, 2006, finding that there were no extraordinary circumstances that prevented Petitioner from seeking earlier and more timely relief (App. 16). The Court of Appeals never addressed the issue of whether the district court erred when it summarily dismissed the original habeas petition on October 2nd, instead of pursuing the procedure mandated by § 1631 for transferring the petition to the proper judicial district (App. 16).

Instead, the court merely found that Petitioner was not entitled to relief under Rule 60(b)(6) because his attorneys failed to move to amend the judgment under Rule 59(d), move to vacate the judgment for mistake under Rule 60(b)(1), or appeal the initial judgment (App. 17). On June 13, 2006, the Ninth Circuit denied a timely-filed petition for rehearing and suggestion of *en banc* review (App. 27).

Gurmeet Dhinsa remains incarcerated — condemned to prison for the rest of his natural life — even though

1. his habeas petition *was* timely filed;

2. the Central District of California never transferred the petition to the Eastern District of New York despite the clear pronouncements in § 1631 *requiring* such a transfer in cases, such as this, in the interest of justice;

3. the order dismissing the habeas petition was issued *before* the time limit but entered by the court *after* the one-year filing deadline;

4. counsel did not appeal that order or move for reconsideration because he had a good faith basis to believe that the habeas petition, which was renewed in the Eastern District, would be deemed timely; and

5. the prosecution delayed the proceedings in the Eastern District for months without ever claiming that the habeas petition was untimely.

Thus, because of these procedural injustices, no court has ever reviewed the *merits* of Gurmeet Dhinsa's claim that he was denied his Fifth Amendment right to testify on his own behalf and his right to the effective assistance of counsel, guaranteed under the Sixth Amendment. This case is particularly compelling since trial counsel does *not* deny the claims of ineffectiveness.

REASONS FOR GRANTING CERTIORARI

WHERE THE COURT ERRONEOUSLY FAILED TO TRANSFER A TIMELY-FILED HABEAS PETITION TO THE PROPER DISTRICT, WHICH DEPRIVED PETITIONER, WHO IS SERVING A LIFE SENTENCE, OF ANY REVIEW OF HIS CONSTITUTIONAL CLAIMS, CERTIORARI IS WARRANTED UNDER THE COURT'S SUPERVISORY POWER TO PREVENT A GROSS MISCARRIAGE OF JUSTICE

A person serving a life sentence timely filed his only habeas petition raising issues of constitutional proportion. Nevertheless, no court has ever reviewed the merits of those violations because his attorney mistakenly filed the petition in the wrong judicial district. And, the district court erroneously failed to transfer the case to the proper district as required by 28 U.S.C. § 1631. As a direct result of these errors, Gurmeet Dhinsa was shuffled back and forth — from one court to another — all to his terrible prejudice. And, in the face of such procedural difficulties he has never achieved justice.

Here, certiorari review is certainly warranted under this Court's supervisory power over the federal judicial system to avoid a gross miscarriage of justice. The original decision to dismiss the habeas petition was, concededly, wrong because the district court failed to abide by the clear mandates of § 1631, which require cases that are filed in the wrong district to be transferred to the right court. And, Petitioner filed a Rule 60(b) motion to reopen that flawed judgment within a reasonable amount of time under the special circumstances of this case.

Rule 60 of the Federal Rules of Civil Procedure sets forth the procedure for obtaining relief from final judgments. Thus, it authorizes the district court to revisit a case based on mistake, fraud, newly discovered evidence and other grounds. Because of its importance, this Court recognizes that Rule 60(b) has an "unquestionably valid role to play in habeas cases." *See Gonzalez v. Crosby*, 545 U.S. 524 (2005).[2]

Rule 60(b)(6) is a safety catchall provision that authorizes a motion to reopen a judgment for "any other reason justifying relief from the operation of the judgment." And, although a petitioner must show "extraordinary circumstances" to invoke Rule 60(b)(6),[3] here such cogent circumstances were presented that were overlooked by the Central District of California and Ninth Circuit.

First, a man is serving a life sentence for a crime that — had he been allowed to testify — he could have established that he did not commit. To allow this defendant to suffer a life term of imprisonment, because of a series of procedural debacles *caused by the court, government and his lawyers*, would be condescending to the historic tradition of ensuring that criminal defendants are entitled to some judicial review of their constitutional claims.

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[2] Although the Court limited its decision in *Gonzalez* to habeas petitions brought by state inmates pursuant to 28 U.S.C. § 2254, we submit that the principles authorizing the application of Rule 60(b) to state inmates should apply with equal force to federal inmates as well.

[3] *Id.*

Gurmeet Dhinsa's habeas petition was filed in district court well within the time limits established in 28 U.S.C. § 2255. The *court* failed to have the order entered in a timely manner — so counsel never learned of the decision until after the filing deadline had lapsed. When the petition was refiled in the Eastern District of New York — as directed by the Central District of California — Judge Korman accepted and entertained the petition, without question, for more than one year — *never* suggesting for one moment that the habeas petition was untimely or time barred.

In fact, neither the court nor the government objected to the refiled petition. Instead, the prosecution repeatedly sought extension after extension to oppose the merits of the petition. This seriously prejudiced Petitioner because this prolonged period overlapped with his time to file a Rule 60(b) motion.[4] Had either the government or court voiced any concern regarding the timeliness of the habeas petition, counsel would have promptly filed a Rule 60(b) motion in the Central District within one year of the October 2nd order. However, Judge Korman raised the issue for the very first time *sua sponte* on October 28, 2003, several weeks after the one year deadline to file a Rule 60(b) motion for reconsideration!

Shortly thereafter, the court dismissed the habeas petition as untimely. And, while Petitioner's appeal was pending in the Second Circuit, his counsel filed the Rule 60(b) motion when it became evident that Mr. Dhinsa could be denied any opportunity to have his only habeas petition decided on the merits. To increase the prejudice even further, the Central District granted the *government's*

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[4] Rule 60(b)(1) authorizes the reopening of a final order based on the court's *mistake* within one year of the entry of judgment.

request to hold the Rule 60(b) proceedings in abeyance pending a determination by the Second Circuit. Thus, in the end, the district court refused to reconsider its highly prejudicial ruling that dismissed Gurmeet Dhinsa's timely habeas petition.

Here, the consequences to Petitioner have been absolutely devastating and warrant review by this Court to rectify this flagrant injustice. Mr. Dhinsa had no reason to believe that the Eastern District would not accept his timely-filed habeas petition — especially because no one challenged its timeliness for more than one year. Therefore, he had every reason to believe that he had done everything required of him in filing his petition.

There was no need or reason for Mr. Dhinsa to appeal or move for reconsideration of the original order dismissing his petition because it was apparent to everyone that it would be accepted as timely by the Eastern District of New York. And, moving for reconsideration in the Central District of California would not have served the interest of judicial economy since the Eastern District was also considering the petition.

Furthermore, Petitioner should not be forced to suffer the ultimate penalty of losing any review of his constitutional claims where the government lulled him into believing that the habeas application was timely — so that no further action was necessary. Therefore, the doctrine of equitable tolling is appropriate and is fully applicable to this case.

Petitioner aggressively pursued a determination on the merits of his only habeas petition through the Eastern District of New York, Second Circuit, this Court, Central District of California and Ninth Circuit. Fundamental fairness and due process require that there be *some* forum in which he can meaningfully raise his constitutional claims that *were* timely filed!

Gurmeet Dhinsa filed his habeas petition on time and would have had a determination on it but for the district court's original error and the other procedural calamities that befell him. Surely when a man has been sentenced to spend the rest of his *natural life in prison*, he is entitled to review of his constitutional claims.

One of the most cherished policies of this nation is that a person who timely asserts that he has been unjustly convicted will be allowed to have his injustice considered on the merits. This case presents an ideal vehicle to determine whether the broad safeguards afforded under the mantle of 28 U.S.C. § 2255 can be denied to a person because of procedural failures attributable to both the district court and his counsel. If not corrected, the issues presented by this case are bound to have wide ramifications throughout the nation.

CONCLUSION

For all the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the Ninth Circuit's order in this case.

September 11, 2006

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CENTRAL DISTRICT OF CALIFORNIA
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GURMEET SINGH DHINSA
Petitioner,

vs.

AL HERRERA,
Respondent.

Case No.: CV 02-7211-VAP (SGL)

ORDER RE SUMMARY DISMISSAL OF ACTION

On September 16, 2002, petitioner filed the instant Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. It appears from the face of the petition that petitioner currently is a federal prisoner incarcerated at the United States Penitentiary in Lompoc, California,

pursuant to a sentence imposed following petitioner's conviction on October 15, 1999, in the United States District Court for the Eastern District of New York by the Honorable Edward R. Korman, United States District Judge, for various racketeering-related offenses. Petitioner is challenging the legality of his conviction and sentence on the grounds that the conviction was obtained without petitioner being properly instructed of his constitutional right to testify on his own behalf.

Under 28 U.S.C. § 2255

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentences, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

As the Supreme Court observed in *United States v. Addonizio*, 442 U.S. 178, 185 (1979), the statute "was intended to alleviate the burden of habeas corpus petitions filed by federal prisoners in the district of confinement, by providing an equally broad remedy in the more convenient jurisdiction of the sentencing court."

In this regard, Section 2255 specifically provides that "[a]n application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section[] shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears

that the remedy by motion is inadequate or ineffective to test the legality of his detention." *See, e.g., Moore v. Reno*, 185 F.3d 1054, 1055 (9th Cir. 1999) (affirming the district court's dismissal of a habeas petition collaterally attacking the validity of a conviction); *Tripati v. Henman*, 843 F.2d 1160, 1162 (9th Cir. 1988). Here, the only reason proffered by petitioner as to why a Section 2255 motion would be ineffective is that petitioner is presently incarcerated in the Central District and "the conviction and sentence were not decided by the California District Court." Petition at 5. Although petitioner's notes correctly that his conviction and sentence was imposed by the District Court for the Eastern District of New York and not the Central District of California, there is nothing about petitioner's presence in a federal prison in California which prevents him from bringing a Section 2255 motion in the sentencing court. Accordingly, the Court finds that petitioner has failed to make the requisite showing that Section 2255 is an inadequate or ineffective remedy.

IT THEREFORE IS ORDERED that this action be summarily dismissed for lack of jurisdiction. Any other relief being sought by petitioner herein (*e.g.*, the application of a non-resident attorney to appear in a specific case) is DENIED as moot.

DATED: September 23, 2002

/s/ Virginia A. Phillips
VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

Presented by:

/s/ Stephen G. Larson
STEPHEN G. LARSON
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED - EASTERN DIVISION
CLERK U.S. DISTRICT COURT
JAN -6 2005
[???] -6 2004
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

GURMEET SINGH DHINSA,
Petitioner,

vs

AL HERRERA, Warden,
Respondent

NO EDCV 02-7211-VAP (SGL)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Virginia A Phillips, United States District Judge, pursuant to the provisions of 28 U S C § 636 and General Order 194 of the United States District Court for the Central District of California.

In March, 1999, Gurmeet Singh Dhinsa was convicted of various charges by a federal jury sitting in the Eastern District of New York, including racketeering, murder, mail fraud, and kidnapping. Dhinsa was sentenced in October, 1999, by the trial judge who presided over his case, Chief Judge Edward R Korman, to multiple life sentences as well as a determinate sentence of thirty-five years. Dhinsa was later sent to serve his sentence at Lompoc Federal Penitentiary, a federal prison located in this district. After his direct appeal of his conviction concluded unsuccessfully in October, 2001, Dhinsa waited just short

of a year before filing, with the assistance of counsel, a Section 2241 habeas petition with this Court on September 16, 2002. At the time Dhinsa's counsel filed the petition, only fourteen days remained before the statute of limitations set forth in 28 U S C § 2244 would expire. Dhinsa alleged in his petition that his conviction was constitutionally defective because, he claims, he had not been instructed at any time by the court or his attorney of his right to testify at trial.

On September 23, 2002, District Judge Virginia Phillips signed an order dismissing the petition for lack of jurisdiction. In the order, the Court determined that, as Dhinsa sought to challenge his conviction, his petition should have been brought under 28 U S C § 2255. A Section 2255 petition, however, must be filed with the sentencing court, in this case the District Court in New York. The order dismissing Dhinsa's Section 2241 petition was not entered, and hence judgment did not become final, until October 2, 2002. *See generally Carter v Beverly Hills Sav and Loan Ass'n*, 884 F 2d 1186, 1189-1190 (9th Cir 1989) (judgment not final until, among other things, it is entered on the court's docket).

Dhinsa's counsel received a copy of the order five days later on October 7, 2002. Dhinsa's counsel did not apply to this Court to reconsider its decision. Neither did his counsel appeal the order to the Ninth Circuit. Instead, Dhinsa's counsel waited forty-four days, and then filed a Section 2255 petition with the District Court in the Eastern District of New York, even though by that point the statute of limitations for filing such a petition had clearly expired. Dhinsa's counsel explains the delay in filing as being the product of his "good faith" belief that

"the sentencing court would" calculate the time of the subsequent petition's filing under "the relation-back doctrine" to when his initial Section 2241 petition was filed with this Court (Mot Relief J at 17).

The District Court in New York, however, did not adopt the course envisioned by Dhinsa's counsel. On December 31, 2003, the District Court in New York dismissed Dhinsa's petition as untimely, even when giving Dhinsa the benefit of tolling the period the Section 2241 petition was pending before this Court. As Chief Judge Korman explained

> The petition was filed in California on September 16, 2002, it was dismissed on October 2, 2002, and petitioner received notice of the dismissal on October 7, 2002. Because he waited until he had only 14 days left to file his habeas petition in California, petitioner had 14 days from October 7, 2002 to refile his petition here. Instead, without any explanation for the delay, he waited until November 20, 2002 to do so.

Dhinsa's subsequent effort to appeal Judge Korman's ruling was denied by the Second Circuit on August 24, 2004.

Dhinsa has since filed a Rule 60(b)(5) & (6) motion for relief from the judgment this Court entered on October 2, 2002. Dhinsa asserts that, under 28 U S C § 1631, this Court was required to transfer his petition, not dismiss it, if it determined it did have jurisdiction over the matter.[1] This Court's action in dismissing, rather than transferring, his initial petition set in motion, in Dhinsa's opinion,

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[1] Section 1631 provides that if a "court finds that there is want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action . . . to any other such court in which the action . . . could have been brought at the time it was filed."

a series of events beyond his control which ultimately led to the dismissal of his petition by the District Court in New York without ever having had the merits of his petition be passed upon. According to Dhinsa, but for this Court's alleged error in failing to transfer his petition to the Eastern District of New York, serious consideration would have been given to the substantive merits of his petition by that court. The premise underlying Dhinsa's argument is built upon a house of cards.

Even were this Court to accept his argument that Section 1631 compelled the transfer, rather than the dismissal, of his petition (and the Court acknowledges that there is controlling precedent to support this argument, *see Miller v Hambrick*, 905 F 2d 259, 262 (9th Cir 1990), *Cruz-Aguilera v I N S*, 245 F 3d 1070, 1074 (9th Cir. 2001)), that does not necessarily compel the granting of relief under Rule 60(b). That a court's judgment was erroneous does not end the analysis under Rule 60(b). Relief under Rule 60(b) is limited to only when certain circumstances exist, lest application of the rule completely undermine the interest in the finality of judgments. To that end, Dhinsa's case does not present the circumstances contemplated for granting relief under either Rule 60(b)(5) or (6).

Rule 60(b)(5) allows a court to relieve a party from a prior judgment if "it is no longer equitable that the judgment should have prospective application". Dhinsa argues that the fact that he remains "bound" by the Court's judgment to dismiss his petition satisfies Rule 60(b)(5)'s requirement that the judgment in question has prospective application. His reading of the rule is too broad. A judgment is considered to have prospective application when it is either "'executory' or involves 'the supervision of changing conduct or conditions.'"

Maraziti v Thorpe, 52 F 3d 252, 254 (9th Cir 1995) (quoting *Twelve John Does v District of Columbia*, 841 F 2d 1133, 1139 (D C Cir 1988)) An order dismissing a case, as the one at issue in this case, is simply not a judgment with the "prospective application" contemplated by Rule 60(b)(5). Rather, it definitively discharges the parties and the court from any further involvement in the case. The fact that the order has "some reverberations into the future" or "continuing consequences does not necessarily mean that it has 'prospective application' for the purposes of Rule 60(b)(5)." *Maraziti*, 52 F 3d at 254.

Nor does the fact that Dhinsa remains bound by the October 2, 2002, judgment advance his cause. "That plaintiff remains bound by the dismissal is not a 'prospective effect' within the meaning of rule 60(b)(5) any more than if plaintiff were continuing to feel the effects of a money judgment against him." *Id* (quoting *Gibbs v Maxwell House*, 738 F 2d 1153, 1155-56 (11th Cir 1984)). Thus, reading Rule 60(b)(5) "to the effect that a judgment has prospective effect so long as the parties are bound by it, would read the word 'prospective' out of the rule." *Maraziti*, 52 F 3d at 254 (quoting *Schwartz v United States*, 976 F 2d 213, 218 (4th Cir 1992)). As one court, whose words are prescient for the disposition of this case, commented: "It is difficult to see how an unconditional dismissal could ever have prospective application within the meaning of Rule 60(b)(5)." *Twelve John Does*, 841 F 2d at 1139 (cited with approval by *Maraziti*, 52 F 3d at 254)

As the October 2, 2002, judgement did not compel either party to perform, or to refrain from performing, some future act, and did not require this Court to supervise any interaction between the parties or anyone else, relief under Rule 60(b)(5) is inappropriate. *See Twelve Does*, 841

F 2d at 1139 (order dismissing one of the defendants was not one of prospective application as it did not compel performance of a future act by any party, or lead to the court's continuing supervision).

Dhinsa's argument under Rule 60(b)(6) fares no better. That subsection of the rule allows relief from judgment for "any other reason justifying relief from the operation of the judgment." Despite the rule's broad and open-ended language, courts have cabined its application to only when "extraordinary circumstances" that were "beyond [a party's] control prevented a party from taking timely action to prevent or correct an erroneous judgment." *United States v Alpine Land & Reservoir, Co*, 984 F 2d 1047, 1049 (9th Cir 1993). So long as a party actually possessed a means to challenge or otherwise seek to correct an allegedly erroneous judgment, Rule 60(b)(6) cannot serve as a basis for relief. The Supreme Court in *Ackerman v United States*, 340 U S 193 (1950), made it clear that Rule 60(b)(6) cannot be used as a substitute for an appeal a party could have, but never bothered, to file. The Court explained that where a party "made a considered choice not to appeal" an adverse judgment, no relief could be granted to it under Rule 60(b)(6), as the party "cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong." *Id* at 198. Stated another way, "Rule 60(b)(6) should not be invoked where the petitioner bypassed his right to appeal for tactical reasons." *Alpine Land*, 984 F 2d at 1049.

The entire series of unfortunate events Dhinsa attributes to the October 2, 2002, Order could have been ameliorated by Dhinsa either filing a motion for reconsideration with this Court in the first instance, or appealing the order to the Ninth Circuit. Dhinsa cannot attribute his failure to do

so on his failure to apprehend the order at the time it was entered. As his motion for relief from judgment makes clear, it was established at the time the order was entered that this Court should have transferred his case (Mot Relief J at 8-14). The fact that Dhinsa did not receive a copy of the Court's order until five days after the judgment was entered also did not compromise his ability to pursue either avenue for direct relief. He still could have, at any point, filed a motion for reconsideration with this Court, *see* Local Rule 7-18 (setting forth no time limits for filing of motions for reconsideration), and he still had fifty-five days to file a notice of appeal with the Ninth Circuit. *See* Fed R App P 4(a).

Dhinsa, however, consciously chose not to take either course, but instead made the tactical decision to re-file his petition in the Eastern District of New York under the impression, now proven mistaken, that the court there would deem the petition filed from the date his initial petition was filed with this court. Rule 60(b)(6) cannot now serve as a salve for the error, viewed with the advantage of hindsight, in judgment his attorneys made. *See Ackermann*, 340 U S at 198. That this case involves a habeas petition does not alter this analysis. *See Greenawalt v Stewart*, 105 F 3d 1268, 1273 (9th Cir 1997) (refusing to grant Rule 60(b)(6) relief in a *pro se* death penalty habeas context as petitioner "failure to appeal [the order in question] may be attributable to inattention or inexperience, but neither deficiency constitutes a 'extraordinary circumstance' that justifies Rule 60(b)(6) relief").

Moreover, one cannot overlook the fact that some of the blame for Dhinsa's petition being untimely was due to the lack of diligence on the part of his own counsel. The District Court in New York entertained the possibility that the statute of limitations could be tolled for the period Dhinsa's petition was pending before this Court, but noted that even this equitable mechanism was thwarted by counsel's unexplained (and still unexplained to this Court) decision to wait forty-four days after receipt of this Court's order before deciding to re-file the petition in New York.

In the end, the fact that Dhinsa could have, but chose not to, file a motion for reconsideration with this Court, a notice of appeal with the Ninth Circuit, or act more diligently in pursuing his remedies before the New York court obviates his entitlement to relief from judgment under Rule 60(b)(6).

Accordingly, the motion for relief from judgment should be denied.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an order (1) Approving and adopting this Report and Recommendation, and (2) directing that Judgment be entered denying the Motion for Relief from Judgment and dismissing this action with prejudice.

DATED 12-17-04

/s/ Stephen G Larson
STEPHEN G LARSON
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LODGED EASTERN DIVISION
CLERK U.S. DISTRICT COURT
JAN 6 2005
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

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CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
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GURMEET SINGH DHINSA

Petitioner,

vs

AL HERRERA, Warden,

Respondent

NO CV 02-7211-VAP (SGL)

ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U S C § 636, the Court has reviewed the Petition, all the records and files herein, and the Report and Recommendation of the United States Magistrate Judge. The Court concurs with and adopts the findings, conclusions and recommendations of the Magistrate Judge.

IT IS ORDERED that Judgment be entered denying the Motion for Relief from Judgment and dismissing this action with prejudice.

DATED February 17, 2005

/s/ Virginia A Phillips
VIRGINIA A PHILLIPS
UNITED STATES DISTRICT JUDGE

Prepared by

/s/ Stephen G Larson
STEPHEN G LARSON
UNITED STATES MAGISTRATE JUDGE

DOCKETED ON CM
FEB 18 2005
BY /s/ 045

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(D)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
APR 05 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

GURMEET SINGH DHINSA, Petitioner - Appellant, v. AL HERRERA, Warden, Respondent - Appellee.	No. 05-55522 D.C. No. CV-02-07211-VAP MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted February 15, 2006
Pasadena, California

Before: CANBY, NOONAN, and KLEINFELD, Circuit Judges.

Gurmeet Singh Dhinsa was convicted of various federal racketeering crimes in the Eastern District of New York. Nearly a year after that conviction became final, he sought to challenge it by filing a writ of habeas corpus in the Central District of California. The district court

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

presumably could have transferred the petition to the Eastern District of New York, where it should have been filed, but instead dismissed the petition. *See* 28 U.S.C. § 1631 (authorizing transfer "if it is in the interest of justice"). Dhinsa attempted to file in New York, but his petition there was untimely. Then, more than a year after the dismissal of his petition in the Central District, he moved that court for relief from judgment under Fed. R. Civ. P. 60(b)(6). The district court denied the motion and Dhinsa now appeals. We have jurisdiction under 28 U.S.C. §§ 1291 & 2253(a) and we affirm.

The district court did not abuse its discretion when it denied Dhinsa's Rule 60(b)(6) motion because there were no extraordinary circumstances that prevented him from seeking earlier, more timely relief. *See United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). Although the court's failure to transfer his case could have been challenged under a Rule 60(b)(1) motion grounded in mistake,[1] Dhinsa filed his motion ten months after the one-year deadline to file a Rule 60(b)(1) motion expired, and mistake that is cognizable under Rule 60(b)(1) is not an extraordinary circumstance under Rule 60(b)(6). *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 n.11 (1988); *see also Molloy*, 878 F.2d at 316 (stating that a Rule 60(b)(6) motion may not be grounded in any of the reasons in Rule 60(b)(1) through (5)).

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[1] Because Dhinsa's appeal from the denial of his Rule 60(b) motion does not raise the merits of the underlying judgment, we do not decide whether the district court erred when it did not transfer his petition to the Eastern District of New York. *See Molloy v. Wilson*, 878 F.2d 313, 315 (9th Cir. 1989).

Dhinsa is not entitled to relief under Rule 60(b)(6) because he "has ignored normal legal recourses." *Alpine Land*, 984 F.2d at 1049 (quoting *In re Pac. Far E. Lines, Inc.*, 889 F.2d 242, 250 (9th Cir. 1989). Dhinsa's conviction became final on October 1, 2001. On September 16, 2002, two weeks before the one-year AEDPA limitations period was to expire, Dhinsa filed his habeas petition in the wrong court. *See* 28 U.S.C. § 2255 (requiring a federal prisoner to file his habeas petition in the district court that sentenced him). After his petition was dismissed he could have moved to amend the judgment under Rule 59(d), moved to vacate the judgment for mistake under Rule 60(b)(1), or appealed the judgment to this court. Because Dhinsa failed to avail himself of any of these usual procedures, he is not entitled to relief under Rule 60(b)(6).

The district court's order is **AFFIRMED.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

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GURMEET SINGH DHINSA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

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MEMORANDUM & ORDER
02-CV-6156 (ERK)
97-CR-0672 (ERK)

Korman, Ch.

On October 28, 2003, I ordered petitioner to show cause why the petition should not be dismissed because his delay in filing the petition made it impossible to reconstruct the factual circumstances underlying his claim of ineffective assistance of counsel. Petitioner's response to my inquiry on his delay in filing the petition relied in part on the fact that his petition was filed within the prescribed one-year period of limitations. The petition was filed three years after he was sentenced. The applicability of the doctrine of laches applies precisely to a case in which the action is filed within the statute of limitations. Otherwise the doctrine would serve no purpose. Nevertheless, petitioner's response caused me to examine the history of the case to determine whether the petition was timely filed.

The Supreme Court denied the petitioner a writ of certiorari on October 1, 2001. *Dhinsa v. United States*, 534 U.S. 897, 122 S.Ct. 219 (2001). The petition was not filed here until November 20, 2002. This was more than one year after the petition was denied. While petitioner filed a petition on September 16, 2002, in the Central District of California, which was styled as a petition pursuant to 28 U.S.C. § 2241, it was dismissed without prejudice for lack of jurisdiction because it should have been filed in the Eastern District of New York as a petition pursuant to 28 U.S.C. § 2255.

The period of time during which the petition was pending in California did not toll. The statute of limitations. *Rodriguez v. Bennett*, 303 F.3d 435 (2d. Cir. 2003). Nevertheless, the doctrine of equitable tolling may be applied to the period in which the petition was pending and decided in the Central District of California. Even so, the petition is untimely. The petition was filed in California on September 16, 2002, it was dismissed on October 2, 2002, and petitioner received notice of the dismissal on October 7, 2002. *See* Letter of Barry A. Kozyra, dated December 29, 2003. Because he waited until he had only 14 days left to file his habeas petition in California, petitioner had 14 days from October 7, 2002 to refile his petition here. Instead, without any explanation for the delay, he waited until November 20, 2002 to do so.

Under the circumstances, the petition must be dismissed because it was not timely filed. Petitioner's implicit suggestion that it was somehow improper for me to raise the issue *sua sponte* is without merit. The Second Circuit has recognized that, while defenses which are required to be raised by Fed. R. Civ. P. 8(c) "are 'ordinarily' not to be recognized when not raised in the answer, *Davis v. Bryan*, 810 F.2d 42, 48 (2d Cir. 1987) (district court

ordinarily should not raise statute of limitations *sua sponte*), *no absolute bar to the consideration of such claims exists. See Carbonell v. Louisiana Dep't of Health and Human Resources*, 772 F.2d 185, 189 (5th Cir. 1985) (court may dismiss *sua sponte* on *res judicata* grounds provided it has before it 'all relevant data and legal records' or is in the same district in which the original action was filed)." *Salahuddin v. Jones*, 992 F.2d 447, 449 (2d Cir. 1993) (emphasis added). The United States magistrate had held in *Salahuddin* that the defendants waived the defense of *res judicata* by failing to raise it in the pleadings. Nevertheless, citing the need to avoid unnecessary relitigation, he dismissed the claims on *res judicata* grounds. *Id.* at 449. The Court of Appeals upheld the dismissal.

Subsequently, in *Pino v. Ryan*, 49 F.3d 51 (2d Cir. 1995), then-Chief Judge Newman observed the reason for the rule against dismissing a complaint *sua sponte* past the point at which the defense is normally required to be raised, is that a *sua sponte* dismissal may be unfair to the plaintiff by rejecting the suit after considerable time and expense has been invested in it." *Id.* at 53. (emphasis in original) Nevertheless, he concluded that, even where the issue is raised *sua sponte* after an answer has been filed, *Salahuddin* "explicitly upheld a court's authority to do so even in that context." *Id.* at 54.

The statute of limitations defense in this case, while raised *sua sponte* after the answer was filed, did not involve a rejection of the "suit after considerable time and expenses has been invested in it by plaintiff." Indeed, plaintiff expended no more time or effort in it, than if the issue had been raised *sua sponte* after he filed the petition and before the answer — which clearly would have been appropriate. *Acosta v. Artuz*, 221 F.3d

117 (2d Cir. 2000). Indeed, having been afforded the opportunity to explain the untimely filing, petitioner can cite no prejudice he suffered because of the timing of *sua sponte* action.

On the other hand, the statute of limitations enacted by Congress reflects compelling considerations of policy. Delay in filing a petition often makes a retrial impossible, if such relief is given, and it may make it difficult to reconstruct circumstances necessary to resolve the petition. As the Second Circuit has held:

> The AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time. Like the other procedural bars to habeas review of state court judgments, the statute of limitation implicates the interests of both the federal and state courts, as well as the interests of society, and therefore "it is not inappropriate for the court, on its own motion, to invoke the doctrine."

Acosta v. Artuz, 221 F.3d at 123. Fed. R. Civ. P. 8(a) is applicable here only to the extent that it may be "appropriate," Federal Rules Governing Section 2254 Cases, Rule 11; it does not warrant undermining these compelling considerations of policy. Nor would it, even it did apply in the same way as it applies to civil cases.

Because I decide the issue petition on the ground that it was not timely filed, I need not address the merits of petitioner's claim, which seem to be wholly lacking, or the defense of laches.

The petition is dismissed. I deny a certificate of appealability.

SO ORDERED:

/s/ Edward R. Korman
Edward R. Korman
United States Chief District Judge

Brooklyn, New York
December 31, 2003

MANDATE

E.D.N.Y(bkny,
02-cv-6156
Korman, J.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 26th day of August two thousand four,

Present:

Hon. José A. Cabranes,
Hon. Chester J. Straub,
Hon. Richard C. Wesley,
Circuit Judges

UNITED STATES
COURT OF APPEALS
FILED AUG 26 2004

Roseann B. MacKechnie, Clerk
SECOND CIRCUIT

Gurmeet Singh Dhinsa,

Petitioner-Appellant,

v.

04-0427-pr

United States of America and Al Herrera, Warden, United States Penitentiary in Lompoc, California,

Respondent-Appellee.

Appellant moves for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is denied and the appeal is dismissed because appellant's 28 U.S.C. § 2255 motion was time-barred. See 28 U.S.C. § 2255.

FOR THE **COURT:**
Roseann B. MacKechnie, Clerk

By: s/Richard Alcantara
Richard Alcantara, Deputy Clerk

AUG 26 2004

SAO-LFR

A TRUE COPY
ROSEANN B. MACKECHNIE, CLERK

ISSUED AS MANDATE:
NOV 3 2004

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUN 13 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

GURMEET SINGH DHINSA,

Petitioner - Appellant,

v.

AL HERRERA, Warden,

Respondent - Appellee.

No. 05-55522

D.C. No. CV-02-07211-VAP
Central District of California, Los Angeles

ORDER

Before: CANBY, NOONAN, and KLEINFELD, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for panel rehearing. Judge Kleinfeld has voted to deny the petition for rehearing en banc, and Judges Canby and Noonan have so recommended.

The petition for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are DENIED.